FILE COPY

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

J. L. HOWARD, *alias* FRANK THOMPSON, A. L. BAILY, *alias* GOMEZ BONO, and H. D. HAWLEY, Plaintiffs in Error,

versus

THE STATE OF NORTH CAROLINA.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1903.

J. L. HOWARD, *alias* FRANK THOMPSON; A. L. DALY, *alias* GONEZ BONO, and H. D. HAWLEY, PLAINTIFFS IN ERROR,

versus

THE STATE OF NORTH CAROLINA.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

The fifth assignment of error is as follows (Record, page 54):

The Court erred in not finding as a fact and holding as its judgment that "conspiracy to cheat and defraud" was and is not an offense known to the law of North Carolina, statutory or other, or justiciable or punishable by its courts; and that in consequence the indictment, conviction, judgment, sentence by said Guilford Superior Court and its affirmance by the Supreme Court of North Carolina was not due process of law, and the detention and confinement of J. L. Howard, A. L. Daly and H. D. Hawley thereunder in the penitentiary of said State was a denial to J. L. Howard, A. L. Daly and H. D. Hawley the equal protection of the laws of North Carolina by the courts thereof, and void under the laws thereof, and in contravention of the Fourteenth Amendment to the Constitution of the United States, and in not discharging J. L. Howard, A. L. Daly and H. D. Hawley from confinement and detention in the penitentiary of North Carolina and from the custody of Captain J. M. Fleming, Warden thereof.

With reference to the Statute 33d Edward 1st *de conspiritoribus*, his Honor Council charged the jury as follows:

"Its existence can be traced back centuries prior to our independence, and such eminent ancient law writers as Coke, Hawkins and others refer in their works to the existence of this crime prior to the passage of the Statute 23d Edward 1st *de conspirito-*

ribus, which statute has been commented upon by counsel for the defendants. Law writers upon the subject of conspiracy generally agree that the statute referred to was only declaratory of the common law to the extent of the crimes enumerated in the act, leaving the common law as applicable to all other forms of conspiracy known to the law."

The books are full of cases sustaining his Honor's view of the law of conspiracy. We shall cite only a few.

State v. Buchanan, 5 Harris and Johnson (Maryland), page 317, is an elaborate discussion of the question, covering fifty pages, and many authorities are cited. In this case, at page 333, the Court says: "Much reliance is placed on the statute of Edward 1st *de conspiritoriabus* on the supposition that the offense of conspiracy was originally created by that statute." The learned Judge then proceeds to show (pages 333-351) that the offense of conspiracy existed prior to the passage of 33d Edward 1st (which, by the way, appears from statutes at large from Magna Charta to Henry 6th, Vol. 1st, page 149, was passed in 1304 instead of 1305), and on page 351 observes: "By a course of decisions running through a space of more than four hundred years from the reign of Edward 1st to the 59th of George 3d, without a single conflicting adjudication, these points are clearly settled:

"1st. That the offense of conspiracy is of common law origin and not restricted or abridged by the Statute 33d Edward 1st.

"2d. That a conspiracy to do any act that is criminal *per se* is an indictable offense at common law, for which it can scarcely be necessary to offer any authority."

In *State v. Burnham,* 15 New Hamp., 396, Gilchrist, J., speaking for the Court, says: "In the first place, we have no doubt that conspiracy is an indictable offense in this State. It is punishable at common law, its punishment is most repugnant to our institutions, and it is an offense productive of much injury and as deserving reprehension under one form of government as another."

To the same effect are the following cases:

Commonwealth v. Hunt, 45 Mass. (4th Met.), 111.

State v. Pulle, 12 Minn., 164.

In the last case the defendants were indicted for a conspiracy to assault one James H. Murray, to daub and put upon his naked body a great quantity of tar and feathers, and the point was made "that there is no statute in this State creating or defining the crime of conspiracy, nor is any punishment affixed by law to any such offense, and therefore this Court had no jurisdiction thereof. The Supreme Court held on appeal that conspiracy not declared a crime by the statute law was punishable because of the common law."

In *United States v. McCord*, 72 Fed. Rep., 159, it is said: "The statutes of the United States do not define what a conspiracy is, or create any new offense. They merely recognize the crime of conspiracy as known to the common law, and the courts must go to the common law to determine what it is."

In Bishop's New Criminal Law, section 174, Vol. II, the Statute of 33d Edward I. is quoted in full, and the author adds, in subsection 2, section 174, the following:

"Since this statute contains no negative word, a principle explained in another connection shows that it abrogates nothing of the prior common law, but leaves indictable whatever of conspiracy was so before."

In *State v. Younger*, 12 N. C., 357, Mr. Chief Justice Taylor declared:

"Conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person, by perjury and a perversion of the law. But it is certain that modern cases have extended the doctrine far beyond the old rule of law, and it has long been established that every conspiracy to injure individuals, or to do acts which are unlawful or prejudicial to the community, is a conspiracy and indictable—as where divers persons confederate together by indirect means to impoverish another, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter, whether it is true or false. 1 Hawk. N. C., 446, sec. 2. Playing at cards for money is in itself unlawful, and where two persons conspire together to make an unlawful act the means of doing an injury to or impoverishing another, it is stronger than many of the

cases which have been held indictable. Even a bare conspiracy to do a lawful act, to an unlawful end, has been held indictable, though no act was done in consequence thereof. 8 Mod., 321."

See also *State v. Brady*, 107 N. C. R., 822.
State v. Powell, 121 N. C. R., 635.

"According to the principles of the common law, a conspiracy upon the part of two or more persons, with the intent, by their combined power, to wrong others or to prejudice the rights of the public, is in itself illegal, though nothing be actually done in execution of such conspiracy. This is fundamental in our jurisprudence." Mr. Justice Harlan, in *Arthur v. Oakes*, 63 Fed. Rep., 321.

In *Farmers Loan and Trust Co. v. Northern Pacific Railroad Co.*, 60 Fed. Rep., 817, it is said:

"These statutes are declaratory of the common law and wholly condemn all conspiracies to injure or oppress or to interfere with the rights of others."

Statutes against conspiracies are merely declaratory of the common law.

Hawkins' Pleas of the Crown, ch. 27, sec. 2.
Rex v. Eccles, 1 Leach, 274.
Chitty Cr. Law, 1139.
Archibald Criminal Practice and Pleading, 1829.
Queen v. Kendrick, 5 Q. B. D., 49.

Authorities in this country to the same effect might be multiplied indefinitely. For example, see

Crump v. Commonwealth, 84 Va., 927.
State v. Stewart, 59 Vt., 273.
State v. Donnelson, 32 N. J. L., 151, 156.
State v. Glidden, 55 Conn., 46.
People v. Petheram, 64 Mich., 252.
State v. Burnham, 15 N. H., 403.
Commonwealth v. Carlisle, Brightly, 36.

ROBERT D. GILMER,
Attorney-General of North Carolina.

THOMAS B. WOMACK,
Of Counsel for Defendant.